

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION**

In re

STELLA MARIE APARICIO,
Debtor.

NORDSTROM fsb,
Plaintiff,

v.

STELLA MARIE APARICIO,
Defendant.

CASE NO. SV 05-99907 MT

Chapter 7

ADV. NO. 05-01373 MT

MEMORANDUM OF DECISION

Date: October 3, 2005
Time: 2:00 p.m.
Place: Courtroom 302

Background

Defendant Stella Marie Aparicio is a middle-aged single parent who is raising a daughter on her own. Her daughter was seventeen as of the filing of the petition. For the past few years, Ms. Aparicio has worked as a clerk in the Los Angeles Superior Court, where she earned a gross annual salary of \$36,000 per year, which amounts to roughly \$2,500 per month in net income. In addition, she received \$1,200 per month, in the form of cash or rent payments, from her partner, Fermin Pina, whom she had been in a

1 relationship with for twelve years and had lived with for the last three years. Finally, Ms.
2 Aparicio also received \$600 in support payments from her daughter's father each month.
3 Thus, Ms. Aparicio's total net income was approximately \$3,800 up through August 2004.

4 In August and September 2004, Ms. Aparicio charged several thousands of dollars
5 to her Nordstrom credit card. The charges were, in part, for food, clothing and other
6 necessities, including for her daughter's educational expenses. Ms. Aparicio claims not
7 to have made several charges at Tiffany & Co. in the amounts of \$687.39 and \$318.35
8 on August 11, 2004. She also claims that while she purchased a television at Circuit City
9 on August 14, 2004 for \$1,190.74, she subsequently returned the television, but to date
10 has not been credited for this return. On August 20, 2004, Ms. Aparicio charged a total
11 of \$300 at the Johnny Thompson music store. Ms. Aparicio's final charge on her
12 Nordstrom card was on September 11, 2004. By this time, Ms. Aparicio's credit balance
13 exceeded her \$8,000 credit limit by \$127.

14 By September, the debtor's relationship with Mr. Pina had ended and Mr. Pina
15 moved out. Additionally, her daughter's father stopped sending support checks. As a
16 consequence, debtor's total net income plummeted to \$2,500 per month.

17 Ms. Aparicio testified that she was ill on and off between July and December 2004
18 with gynecological problems, resulting in significant blood loss, back pain, headaches,
19 hemorrhaging and weakness. This caused her to miss work sometimes, although mostly
20 for half days. She missed one week of work in early September. The problem was
21 ultimately determined to be a hormonal imbalance and was corrected. She incurred
22 \$300 in out-of-pocket medical expenses while the rest was covered by insurance.

23 Ms. Aparicio filed a voluntary petition under chapter 7 on December 15, 2004.
24

25 **Analysis**

26 Plaintiff Nordstrom fsb contends that, under 11 U.S.C. § 523(a)(2)(A), Defendant
27 Stella Marie Aparicio should not be discharged of certain consumer debts, specifically
28 credit card charges made by Defendant between August 8, 2004 through September 11,

1 2004 in the amount of \$4,557.01. Based on the September 13, 2005 Joint Pre-Trial
2 Order Pursuant to Local Rule 7016-1(b), the dispute is limited to \$2,196.48.

3 Section 523(a)(2)(A) provides, in pertinent part, that "[a] discharge under section
4 727 . . . does not discharge an individual debtor from any debt . . . (2) for money,
5 property, services, or an extension, renewal, or refinancing of credit, to the extent
6 obtained, by (A) false pretenses, a false representation, or actual fraud" To
7 succeed on its Complaint, Plaintiff Nordstrom must show that:

8 (1) Debtor made a misrepresentation;

9 (2) At the time she knew her representations were false;

10 (3) She made these representations with the intention and purpose of deceiving
11 Nordstrom;

12 (4) Nordstrom relied on her representations; and

13 (5) Nordstrom sustained a loss as a result of the misrepresentation.

14 See In re Hashemi, 104 F.3d 1122, 1125 (9th Cir. 1996); In re Anastas, 94 F.3d 1280,
15 1284 (9th Cir. 1996); In re Dougherty, 84 B.R. 653, 656 (9th Cir. BAP 1988).

16 There appears to be no issue on most elements of this cause of action. The
17 debtor represented at the time she incurred the charges that she would pay them, and
18 Nordstrom allowed the charges in reliance on those representations. Nordstrom has
19 incurred a loss as a result of those representations. In a credit card nondischargeability
20 action such as this, the critical inquiry is whether the individual charges were made with
21 fraudulent intent. The parties have focused their evidence and arguments on whether
22 the debtor knew she was planning on filing bankruptcy and, consequently, never intended
23 to pay the charges she incurred.

24 Courts have developed a list of factors that trial courts should consider in
25 attempting to determine the debtor's intent. The factors are:

- 26 1. The length of time between the charges made and the filing of bankruptcy;
27 2. Whether or not an attorney has been consulted concerning the filing of
28 bankruptcy before the charges were made;

3. The number of charges made;
4. The amount of the charges;
5. The financial condition of the debtor at the time the charges are made;
6. Whether the charges were above the credit limit of the account;
7. Whether the debtor made multiple charges on the same day;
8. Whether or not the debtor was employed;
9. The debtor's prospects for employment;
10. Financial sophistication of the debtor;
11. Whether there was a sudden change in the debtor's buying habits; and
12. Whether the purchases were made for luxuries or necessities.

Anastas, 94 F.3d at 1284 n.1; Dougherty, 84 B.R. at 657. While this list of factors is non-exclusive, this list provides a useful structure for analyzing the evidence in this case. I discuss each of the above factors in turn below.

1) The length of time between the charges made and the filing of bankruptcy

The charges at issue were all made between August 8, 2004 and September 11, 2004. Debtor filed bankruptcy on December 15, 2004, three months and four days after the last charges were made on the Nordstrom card. Given the testimony concerning the loss of income to the debtor in September and her attempts to make some minimum payments on her credit cards after that, this timing appears to indicate that the debtor took approximately two months to realize fully that she could not easily reverse the financial decline she was in after the loss of income.

2) Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made

The uncontradicted testimony of the debtor was that she started to call around to compare the fees of different bankruptcy attorneys around the beginning of December. She chose Harriet Goldfarb because her fees were the lowest. Debtor paid Ms. Goldfarb \$515 to file a no-asset Chapter 7 case.

1 Ms. Aparicio previously filed chapter 7 bankruptcy eleven years ago in 1993 and
2 employed Ms. Goldfarb for that case as well.

3 Plaintiff argues that a debtor's previous bankruptcy and reemployment of the same
4 attorney indicates an intent to discharge the debtor's consumer debt in a second
5 bankruptcy filing. While this may often be the case under such facts, I do not find that
6 they militate strongly in favor of such an inference in this case. Ms. Goldfarb is, in fact,
7 one of the most reasonably priced consumer debtor counsel in the Los Angeles area,
8 where no-asset Chapter 7 fees are regularly \$800 to \$1000. Ms. Goldfarb does a
9 considerable amount of consumer debtor work in the Los Angeles area, so it is not really
10 that unusual that Ms. Aparicio would find her again. While Ms. Aparicio testified that she
11 shopped around to find out what bankruptcy attorneys were charging before she went
12 back to Ms. Goldfarb, she does not appear to have actually spoken to a bankruptcy
13 attorney until two and a half months after the last charges at issue.

14 In addition, if Ms. Aparicio had formulated a plan to run up her credit cards and
15 then subsequently discharge this debt in a second bankruptcy filing based on knowledge
16 acquired in 1993 from Ms. Goldfarb or through her exposure to legal issues while working
17 in the clerk's office of the Family Law court, many of the actions she took in the year
18 before she filed a second time would be inconsistent with such an intent. Ms. Aparicio
19 made a payment on her Nordstrom card on February 3, 2005 for \$2,500 when the
20 minimum payment due was \$21. If she had planned to eventually file bankruptcy again,
21 she could have kept her credit card account open with a minimum payment. She also
22 appears to have attempted to pay down other credit cards such as GAP and Providian.
23 Her schedules indicate that any new charges on her credit cards stopped by September
24 2004 - the same month she found out her income would be drastically reduced.

25
26 Plaintiff's argument that the debtor formulated her intent to file bankruptcy earlier
27 than December also contravenes the Plaintiff's response to Defendant's interrogatory
28 number 5, admitted as Defendant's Exhibit 3. When asked if "Stella Marie Aparicio

1 knew, on or before September 11, 2004, that she would be filing a bankruptcy," Plaintiff
2 responded, "No. Not at this time."

3 3) The number of charges made

4 There were fifteen charges made during the relevant time period, but three of
5 these fifteen charges were disputed by Defendant at trial.

6
7 **Tiffany & Co.:** On August 11, 2004, there are two charges recorded at Tiffany's
8 for \$687.39 and \$318.35, totalling \$1005.74. No other information was provided by
9 Nordstrom concerning these charges other than the account statement indicating the
10 charges were routed through an account in New Jersey. No underlying charge slip or
11 explanation was provided as to what item was actually purchased.

12 The debtor testified that she had no idea what these charges were and did not
13 purchase anything at Tiffany's. She admitted that the charges made two days before the
14 Tiffany's charges and two days afterwards were in fact made by her and stated that she
15 did not lend her card to anyone.

16 **Circuit City:** On August 14, 2004, the debtor charged \$1,190.74 at Circuit City for
17 a 20-inch television set. She testified that her domestic partner, Fermin Pina, had said
18 he would make the payments. Shortly after the purchase, Mr. Pina decided to end his
19 relationship with the debtor and move out. When she realized that he would not pay for
20 the television, she stated that she went back to Circuit City on August 28 and returned it.
21 She only learned that Circuit City did not credit her account later when this litigation
22 started. At that time, she went back to Circuit City and tried to get a record of the return.
23 She said that Circuit City said the return was possibly credited to another credit card
24 account and she was unable to get them to provide the records she wanted.

25 The disputed charges discussed above total \$ 2,196.48. They appeared on the
26 debtor's Nordstrom statement with a closing date of August 27, 2004. This statement
27 required a minimum payment of \$211 due by September 21, 2004.

28 Ms. Aparicio did not dispute the charges with Nordstrom after she received her

1 statement reflecting the Tiffany's charges. She does not dispute that she knew how to
2 initiate a dispute about an incorrect charge on her credit card, as she had disputed a
3 charge earlier relating to a product which she never received. That dispute was resolved
4 in her favor and Nordstrom credited her account. See Plaintiffs Exhibits D & E.

5 Ms. Aparicio stated that she did not call to dispute the three incorrect charges
6 because her life was in such disarray at that time that she failed to examine the
7 statement. She said she just looked at the minimum payment due and realized that she
8 could not afford to make it. At the time this statement arrived, her partner had just moved
9 out, reducing her monthly income by \$1200. Her daughter's father had stopped paying
10 \$600 per month in child support because her daughter refused to go visit him. She had
11 been sick with significant gynecological issues and was weak from constant bleeding.

12 I found that Ms. Aparicio was credible in her testimony. She was forthcoming in
13 her answers and appeared to be honestly responding to all questions despite the
14 uncomfortable and sensitive subject matter under discussion. Given her situation in
15 September 2004 when this statement arrived, her testimony that she did not study the
16 charges on the Nordstrom statement are credible. Her financial situation only worsened
17 steadily in the next two months, making it increasingly unlikely that she would recognize
18 the problem or even that she would be able to make the minimum payment.

19 Thus, I find that Ms. Aparicio's purchases during this period were not so numerous
20 to indicate an intent to not pay for them.

21
22 4) The amount of the charges

23 The charges subject to this dischargeability action, including the three disputed by
24 debtor, are alleged to be \$5,048.55 in the Complaint. As I find that the Tiffany's and
25 Circuit City charges are not properly attributable to the debtor, the amount at issue is
26 limited to \$2,852.07. The pretrial order states that solely \$2,196.48 is at issue, which
27 would seem to relate solely to the Circuit City and Tiffany's charges. Given that there
28 was some confusion at trial as to what charges were included in this amount, however, I

1 have evaluated all the charges in this time period. I find that either way, the amount of
2 the charges does not indicate a credit card run-up with an intent to defraud.

3 5) The financial condition of the debtor at the time the charges are made

4 The debtor made a payment of \$100 on August 7 and \$155 on July 17. At the
5 time she incurred the charges in August and early September, it did appear that she had
6 the ability to pay for the charges she had made. The testimony of debtor's expert
7 witness, Tony Santana, was persuasive that, but for the loss of income in September, the
8 debtor would have been able to pay these charges.

9 The evidence is uncontroverted that in August 2004 the debtor had \$1,240 in
10 disposable income. Although her income was only \$2,500 a month, her living expenses
11 were reasonable, and she received \$1200 in reimbursement for her expenses from Mr.
12 Pina and \$600 from her daughter's father each month. The combined effect of the
13 withdrawal of these two amounts in September reduced her household income from
14 \$4,300 in August to \$2,500 in September. According to Mr. Santana, this reduced her
15 monthly disposable income from \$1,240 to a deficit of \$560 per month.

16 While the charges in early September totaling \$228.72 might have been after she
17 knew Mr. Pina was moving out, it is unclear whether she was fully aware at that time that
18 all future income from both Mr. Pina and the child's father was being withdrawn. In
19 addition, these items were mainly for food and shoes, and do not indicate a sudden rush
20 to run up credit in advance of bankruptcy.

21 6) Whether the charges were above the credit limit of the account

22 The debtor did in fact exceed her credit limit by \$127. This amount is not
23 significant, and Ms. Aparicio would not have been over the limit if the Tiffany's and Circuit
24 City charges had been properly credited.

25 Ms. Aparicio did request a credit limit increase on August 8, 2004, and was turned
26 down due to her credit score. While this fact might indicate an intent to spend more than
27 she knew she could repay, she also testified that she usually received extra money at the
28

1 end of the summer from her daughter's father to pay for school clothes. It does not
2 appear that she knew in early August that her daughter's father was cutting off all
3 remaining support payments. In the entire context of the debtor's situation, this factor
4 alone is insufficient to demonstrate a fraudulent intent.

5 7) Whether the debtor made multiple charges on the same day

6 Debtor did make up to four charges a day on a few days, but mostly this was in
7 different departments of Nordstroms department store. There is no evidence of a
8 spending spree or an indiscriminate run-up of the account.

9 8) Whether or not the debtor was employed; and

10 9) The debtor's prospects for employment

11 Ms. Aparicio was employed as a clerk at the Los Angeles Superior Court, Family
12 Law Division. She had been employed there for many years and is still so employed.
13 She appears to have had reasonable expectation of a steady income in the future from
14 which to pay her debts.

15 Plaintiff has argued that the debtor made inconsistent statements about her
16 income at trial, in her bankruptcy schedules and in the interrogatories, and therefore was
17 not credible. The variations between the statements were between \$100 and \$200 a
18 month, and I did not find the variances significant. The debtor appeared to be rounding
19 off and not necessarily taking benefits into account in her trial statement, whereas it
20 appears she may have been in her schedules. There really is no dispute that her gross
21 income was in the range of \$36,000 a year and that the reduction in income in
22 September and subsequent months was \$1,800.

23 10) Financial sophistication of the debtor

24 While Plaintiff argued that this debtor was sophisticated and planned this
25 bankruptcy based on her earlier filing and her awareness of the law from working as a
26 clerk, the court found the debtor to be rather unsophisticated financially. She testified
27 that she thought she had purchased a Lexus car but returned it a short time later
28

1 because she learned that it was a lease and not a sale she had entered into. This does
2 not indicate much sophistication. In addition, the debtor's experience is in Family Law
3 court and does not appear to be in connection with bankruptcy or commercial law
4 matters. She demonstrated poor planning and shopping choices, given her income level,
5 indicating a lack of awareness concerning her true financial situation.

6 11) Whether there was a sudden change in the debtor's buying habits

7 Over the course of the account charges from October 2003 through the time
8 period at issue, it appears the debtor's spending habits were consistent. There are
9 regular charges throughout the one year period for eating out, going to theme parks, a
10 vacation, a diet supplement product, higher quality shoes and clothing as well as
11 groceries and gasoline. The only significant change in the debtor's buying habits
12 appears to be the two Tiffany's charges and the Circuit City charge.

13 Although the court has already found that these disputed charges should not be
14 attributed to the debtor in this proceeding, the lack of any other "big ticket" or luxury
15 consumer goods item bolsters the debtor's testimony as well that she was spending with
16 the belief that she would pay the bills over time, as she had in the past.

17 One item on August 20 charged at "Johnny Thompson Music" appeared unusual,
18 given previous spending. However, the debtor explained in her testimony that this charge
19 was made was in order to get the music store to release a trumpet Mr. Pina had bought
20 on installments. He is a musician and needed the trumpet. He had promised to pay the
21 bill, but it appears he reneged on that promise when he moved out.

22 12) Whether the purchases were made for luxuries or necessities

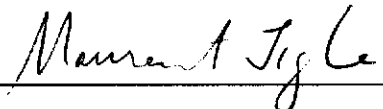
23 While most of the purchases appear to be predominantly at what one would think
24 of as "higher end" retail stores, the purchases themselves would not really be
25 characterized as luxuries. They were for clothing and shoes required either for the
26 debtor's work wardrobe or for her teenage daughter, along with a haircut for her
27 daughter. The restaurant charges are also within reasonable amounts and are at
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1 moderately priced establishments. It is not the role of this court to say that the debtor
2 should have been shopping at Walmart or Sears instead of Nordstroms and Saks, but
3 instead to evaluate whether the extent of the luxury purchases might indicate an intent to
4 defraud the creditor. These purchases are simply not so out of line that they indicate
5 such an intent.

6
7 **Conclusion**

8
9 In summary, the testimony at trial demonstrated a single parent making \$36,000 a
10 year who got in over her head due to unexpected reductions in contributions she had
11 been receiving for years from other sources. Plaintiff's arguments that she made poor
12 choices leading up to this situation simply do not amount to evidence that the debtor
13 intended to defraud Nordstrom. I find that the debtor had the ability to pay off this
14 account at the time she incurred the debt and that she intended to do so. Circumstances
15 following the charges led to her Chapter 7 filing. Accordingly, Plaintiff's debt to
16 Nordstrom fsb may be discharged and judgment will be entered in favor of Ms. Aparicio.

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19 DATED: 10/6/05

20
21 

22 MAUREEN A. TIGHE

23 United States Bankruptcy Judge

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25
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CERTIFICATE OF SERVICE BY MAIL

I certify that a true copy of this **MEMORANDUM OF DECISION** was mailed on
_____ to the parties listed below:

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Dated:

OCT 6 2005

DEPUTY CLERK